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Nos. 82-1913 and 82-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOE G. GARCIA,

Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et. al.*,

Appellees

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et. al.*,

Appellees

On Appeal from the United States District Court for the Western District of Texas

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BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF A PLENARY HEARING AND AFFIRMANCE OF THE DECISION BELOW

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QUESTION PRESENTED

Whether publicly-owned and operated mass transit systems are a "traditional governmental function."

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INTEREST OF THE AMICI

The *amici* are organizations which represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in the powers and responsibilities of these governments, and in legal issues affecting such powers and responsibilities.

As pointed out *infra*, issues of profound consequence for the authority and functions of state and local jurisdictions are presented by this case. *Amici* are therefore submitting this brief to assist the Court in its consideration of the questions raised by this litigation.[1]

STATEMENT

1. The opinion below is one of several recent lower court decisions on whether a publicly-owned mass transit system is a "traditional governmental function."[2] This question has repeatedly arisen because an activity must be a "traditional" function in order to qualify for Tenth Amendment immunity under the third prong of the immunity test established by this Court. In its entirety, the third prong is that "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" *EEOC* v. *Wyoming*, —— U.S. ——, ——, 103 S.Ct. 1054, 1061 (1983).

The lower courts are in conflict on whether mass transit is a traditional function. The court below, and the Court of Appeals for the First Circuit,[3] have ruled mass transit *is* a traditional governmental function. The Third, Sixth and Eleventh Circuits have ruled it is not.[4]

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

[2] The opinion below is *San Antonio Metropolitan Transit Authority, et. al.* v. *Donovan, et. al.*, 557 F. Supp. 445 (D.C.W.D. Tex., 1983).

[3] *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982).

[4] *Kramer* v. *New Castle Area Trans. Auth.*, 677 F.2d 308 (3rd Cir. 1982), cert. den. — U.S. ——, 103 S.Ct. 786 (1983); *Dove* v. *Chattanooga Area Regional Trans. Auth.*, 701 F.2d 50 (6th Cir. 1983); *Alewine* v. *City Council of Augusta, Ga.*, and *Joiner* v. *City of Macon*, 699 F.2d 1060 (11th Cir. 1983).

Two of the conflicting cases are presently pending in this Court. They are the present case, in which Jurisdictional Statements have been filed on direct appeal, and *City of Macon* v. *Joiner*, No. 82-1974, O.T. 1982, in which the petitioner seeks a writ of certiorari directed to the Eleventh Circuit.

2. The court below issued a wide-ranging opinion on whether mass transit is a "traditional" governmental function. It found that "[t]he historical reality of mass transit reveals a long record of state concern and activity in the field." 557 F.Supp. at 448. Prior to today's predominantly public ownership of mass transit, this governmental concern had been expressed through state and city "regulation of fares, routes, schedules, franchising, and safety." *Ibid.* The private ownership previously existing under this regulation, ruled the court, did not negate the fact that today's publicly-owned mass transit systems are a governmental function. *Id.* at 448, 450. The court felt a contrary holding would represent the "'static historical view of state functions'" eschewed by this Court in *United Transportation Union* v. *Long Island Railroad Co.*, 455 U.S. 678, 102 S.Ct. 1349 (1982). *Id.* at 450.

In a section of its opinion dealing with an extensive list of federal statutes, the court held that federal regulatory authority would not be eroded by ruling mass transit to be a governmental function. *Id.* at 448-50. The court pointed out that the statutes are inapplicable anyway (often because of exemptions), are only of recent vintage, or, like clean air laws, will continue to govern.

The court also looked at other relevant factors in determining whether publicly-owned mass transit is a traditional governmental function. It noted that the states and Congress have both recognized that public transportation is an essential state function, *id.* at 451, and it quoted numerous legislative statements showing this congressional view. *Ibid.* It also found that it is "extremely

difficult" to distinguish mass transit from activities this Court has ruled to be traditional governmental functions, *ibid.*, activities such as police protection, fire protection, schools, public health, parks and recreation. In this regard, the court noted that while Congress has made money available to local governments for mass transit, it has also made huge annual amounts available for the other activities. *Id.* at 452. The latter amounts range from hundreds of millions of dollars per year to many billions of dollars per year. *Ibid.*

Finally, the court pointed out that in urban areas mass transit is pervasively supplied by government, which provides it "over 90 percent of the time" when measured by vehicle miles and passenger trips, and "[i]n 230 of . . . 279 urban areas." *Id.* at 453. As well, the court ruled mass transit "benefits the community as a whole," cannot be provided at a profit, is in fact provided at a 75 percent operating loss which is primarily subsidized by state and local taxes, and, in the absence of profit, can only be provided by government. *Ibid.*

REASONS FOR GRANTING A PLENARY HEARING

1. This litigation is one of the two currently pending cases that present this Court with the question whether publicly-owned and operated mass transit systems are a "traditional governmental function." The other pending case is *City of Macon* v. *Joiner*, No. 82-1974, O.T. 1982. In their brief in support of *certiorari* in *Macon*, *amici* have set forth the reasons why this Court should grant a plenary hearing in the two proceedings. Thus, those reasons will only be summarized here. For a more extensive treatment of them, *amici* respectfully refer the Court to their brief in *Macon*, which can be read in conjunction with this brief.

In summary, the reasons for a plenary hearing are these:

A. The cases present the highly important issue of whether an activity now predominantly conducted by local governments is precluded from being a protected governmental function because it formerly was conducted by private enterprise. If an activity *is* so precluded, then governmental activities essential to the welfare of millions of citizens will be completely foreclosed from Tenth Amendment immunity against federal regulation. The power of state and local governments to effectively meet the needs of their citizens will be hindered, and the costs encountered by these governments will rise.

B. State and local governments are not static. They change their activities as required by the needs of citizens. In recent decades they have increasingly found it necessary to provide their citizens with a wide range of essential services, including airports, waste disposal facilities, hospitals, nursing homes, utility services, and other necessities of life. State and local governments need to know the circumstances in which their activities will be "traditional governmental functions" eligible for Tenth Amendment immunity. Lower courts have not provided the necessary guidance, and a clarifying decision from this Court is required.

C. There is a direct conflict among the lower courts on whether mass transit is a "traditional governmental function." The conflict exists among the circuits and between circuit court decisions and the opinion below.

D. The decisions holding mass transit is not a protected governmental function are inconsistent with this Court's decision in *United Transportation Union* v. *Long Island R.R.*, *supra*. This is true both as a factual matter and a legal one. As a factual matter, the commuter railroad services at issue in *Long Island R.R.* were overwhelmingly provided by privately-owned systems, whereas mass transit is overwhelmingly provided by publicly-owned systems. As a legal matter, the decisions holding mass transit is not a "traditional" governmental function have imposed precisely the "static historical view" of state

functions that was explicitly eschewed by this Court in *Long Island R.R.*, 445 U.S. at 686, 102 S.Ct. at 1357.

2. Nothing presented by appellants in this case alters the need for plenary hearing and decision by this Court. Appellants essentially make two arguments not covered in *amici's* brief in *Macon*. They argue, first, that mass transit is not a traditional governmental function because Congress provided some of the money used by local governments in acquiring and operating mass transit systems. Second, they assert that federal regulatory authority would be eroded by holding mass transit to be a traditional governmental function. This alleged erosion is particularly inappropriate, they say, because federal grant monies helped finance local governments' purchase of transit systems.

Neither of these additional arguments provides warrant for holding that mass transit is unprotected by the Tenth Amendment:

A. That Congress provided grants that were used in purchasing and operating mass transit does not prevent publicly-owned mass transit systems from being a protected governmental function. Rather, the congressional grants to local governments illustrate the national legislature's own recognition that it is essential for these governments to provide a vital service indispensable to the daily welfare of millions of their citizens.[5]

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[5] The legislative record of congressional enactments dealing with mass transit contains numerous statements that mass transit is vital to today's society. These statements appear in statutory declarations of policy, in committee hearings and reports, and on the floor of Congress. See, e.g., 49 U.S.C. §§ 1601b(2), 1601b(4), 1601b(5), 1601b(*l*); H.Rep. No. 204, 88th Cong., 2d Sess., 1964-2 U.S. Code Cong. and Admin. News, pp. 2571, 2572, 2573; see also the congressional statements quoted in the opinion below, 557 F.Supp. at 451.

Furthermore, in its *Jurisdictional Statement* the government properly concedes that by 1964 Congress "had concluded that mass transportation needs have out-stripped the present resources of cities and States," and that a "nationwide program" would "assist

Appellants' argument would vitiate federalism, a result wholly inconsistent with this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Because the federal government's ability to tax and otherwise raise money is vastly superior to that of state and local governments, Congress has felt it necessary to grant the latter scores of billions of dollars annually to enable them to carry out vital activities.[6] These activities preeminently include ones this Court has held to be traditional governmental functions protected by the Tenth Amendment. As the court below pointed out, in 1979 alone the federal government granted state and local governments almost six billion dollars for education, over fourteen billion dollars for health, more than three and one-half billion dollars for sewage plants, and over one-half billion dollars for the administration of justice. If the use of grant funds were a criterion for assessing whether an activity is a traditional governmental function, these activities could not be protected under the Tenth Amendment, a result directly at odds with *National League of Cities* v. *Usery*, *supra*. As well, Congress' superior ability to tax and otherwise raise money would be converted into an instrument for injuring federalism by precluding state and local governments from receiving immunity for local activities that are plainly their responsibility.

These untoward consequences are not changed by the federal government's strained argument that mass transit is different from other activities because grant funds were used not only in the *operation* of publicly-owned transit systems, but in *acquiring and constructing* gov-

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in solving transportation problems." *Jurisdictional Statement of Appellant Donovan*, p. 18, quoting H.Rep. No. 204, 88th Cong., 1st Sess. 4 (1963).

[6] It has been estimated that the federal government granted 82.9 billion dollars to state and local governments in 1980. Madden, the *Constitutional and Legal Foundation of Federal Grants*, in *Federal Grant Law* (American Bar Association, 1982), at p. 6, n.3.

ernmentally-owned transit facilities. The fact is that federal grant funds have been used extensively to acquire and construct governmentally-owned facilities for many activities that are protected governmental functions. Beyond this, there is no meaningful distinction for Tenth Amendment purposes between the use of grant funds in acquiring necessary facilities and their use in conducting necessary daily operations. Funds for the adequate daily operation of an activity are as essential to state and local governments as funds for acquiring the requisite capital facilities. A lack of sufficient funds for either purpose would greatly hinder the ability of state and local governments to carry out vital functions.

B. The appellants' argument concerning alleged erosion of federal regulation is no sounder than their argument on grant monies. For as shown by the court below, specific regulation of mass transit has chiefly been regulation by state and local governments, not regulation by the federal government. It has been state and local governments that have regulated entry into the business, fares, routes, schedules and safety.[7]

But even were federal regulation lessened by holding mass transit to be a traditional governmental function, a contrary holding would still be unjustified. Federal regulation is preeminently regulation of private parties, and this Court has made clear that federal regulatory authority can be exercised over private companies where it cannot be exercised over state and local governments. *Hodel* v. *Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 286-287, 101 S.Ct. 2352, 2365 (1981); *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 845, 855-856, 101 S.Ct. at 2471, 2475-2476 (1976). Thus, that the federal government has regulated private parties who owned mass transit systems does not justify it in

[7] As said before, the lower court also pointed out that federal laws that could affect mass transit are inapplicable anyway, are only of recent origin, or—as in the case of generalized environmental and other laws that affect a host of activities besides transit—will continue to govern.

regulating local governments when *they* have now become the overwhelmingly predominant supplier of transit services (and have done so to fulfill their governmental responsibility to accommodate vital needs of citizens whom the private parties could no longer serve). Correlatively, a lessening of federal regulation if mass transit is ruled to be a protected governmental function does not justify an opposite ruling.

Nor is any of this changed because federal grants were used by local governments in acquiring transit facilities. For as said earlier, if the use of grant monies made a difference, then grants would gravely harm federalism by precluding Tenth Amendment immunity for local activities that have to be conducted by state and local governments.

CONCLUSION

For the foregoing reasons, this Court should order a plenary hearing in this case and, upon such hearing, should affirm the decision below.[8]

Respectfully submitted,

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[8] As indicated in *amici's* brief in *Macon*, p. 15, a plenary hearing is desirable both in that case and this one. For each case presents certain differing facets of the same problem. Thus *Macon* contains judicial findings showing that an overwhelming percentage of the citizens who use mass transit are dependent upon it, while in the instant case the publicly-owned transit system received UMTA funds from the federal government.

If a plenary hearing is granted in only one of the two cases, the other should be retained on the docket pending the Court's plenary decision.